CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

WESTERN DISTRICT, OCTOBER TERM, 1818.

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HICKS & WIFE vs. CALVIT.

If a slave is claimed, under a statute which declares him forfeited, if he be removed without the consent of the reversioner, the petition must state that he was so removed.

Quere—whether a slave, forfeited under the laws of a state, may be recovered in another—whether the courts of a state will carry into effect the penal laws of another?

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim a negro woman and her offspring, as part of the estate of Mrs. Hicks's father, who died intestate, and whose only heir she is. The general issue is pleaded. In order to establish her title, the plaintiffs shew, by testimony, that the wench made part of the estate of her father—that he died intestate—and that she was his only daughter and heir; but the witnesses depose, that the woman in dispute was assigned to the widow of the deceased, Mrs. Hicks's mother, as part of her dower—that the widow removed, after her husband's death, from Virginia to Tennessee, bring-

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ing with her, among other property, the slave sued for. The plaintiffs shew that, by an act of the legislature of Virginia, a widow, who removes out of that state any slave assigned to her, as part of her dower, without the consent of the reversioner, forfeits such slave, and every other part of her dower, to the reversioner. *Revised Code*, 191. The district court gave judgment for the plaintiffs.

It is neither alledged nor proven, that the removal of the slave was illegal, *i. e.* without the consent of the reversioner, and we are bound to presume that it was not so. For any thing that appears in the record, this must be presumed. It is true, that a negative fact is not susceptible of proof, and is necessarily presumed, where the party against whom it is alledged does not shew some positive fact, which overthrows the presumption; but here the illegality of the removal is not alledged.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be a judgment of non-suit, with costs of suit in both courts.

I. Baldwin for the plaintiffs, *Wilson* for the defendant.

HOLMES & AL. vs. *PATTERSON.*

A deed of sale, not valid as such, may be so as a deed of gift.

A donation is valid, tho' the donor died, without delivering the deed of the property, if he did not make any other disposition of the property.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim from the defendant, curator of the estate of Joseph Holmes, the property of the deceased, which came to his hands.

The right of the plaintiffs to the estate is not disputed; but the defendant contends he has a right to a negro slave, named Lucy, and her offspring, who were by him inventoried, as the property of the deceased. He shews he was but nineteen years of age, when he made the inventory, and produces an authentic bill of sale of the slave, from Joseph Holmes to him.

It cannot be doubted that, as he was a minor, he cannot be precluded by the inventory.

The bill of sale is made *for value received.* Neither the amount, nor the nature, of what was given as the consideration of the sale, is expressed nor proven. It is contended that, on this account, the bill of sale is void. A price is of the essence of the contract of sale. *Pothier on obligations, n.* 6; and this price must be a *serious* one. *Pothier, contrat de vente, n.* 16. And as, in the present case, it does not appear that there was a *serious* price, there is

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no price. A price, says Pothier, which bears no proportion to the thing sold, is not a true price, as if a valuable tract of land be sold for a crown. *Id.* 20. But the defendant's counsel shews that a deed *for value received* is good. *Jackson* vs. *Alexander*, 3 *Johns.* 484.

He further contends that, if the instrument under consideration be not evidence of a sale, it is of a *donation*. *Pothier, contrat de vente*, n. 16. The plaintiffs contend, that the donation, if any existed, was revoked by the death of the donor, before the acceptance of the donee. In the present case, it does not appear that there was any such acceptance; but we are of opinion that the instrument is valid, at least as a deed of gift, and that as there was such a deed, the donation is valid, although the donor died without having delivered either the deed or the property mentioned therein, if he did not make any other disposition of it. *Quando ni la cosa ni la escritura fueren entregadas, si (el donante) muere y no ha dispuesto de ellas, tiene efecto la donacion a favor del que se expressa en la escritura. Fuero real*, 3, 12, 10.

The district court erred in decreeing the delivery of the slave and offspring to the plaintiffs; and the judgment is, therefore, annulled, avoided

ed and reversed; and it is ordered, that the defendant be quieted in the possession and enjoyment and property of the said negro Lucy and her offspring, and that he account for the balance of the estate, in the district court, and the costs of the appeal be borne by the appellees.

Sutton for the plaintiff, *I. Baldwin* for the defendant.

MARSHAL, J. & WIFE vs. *MARSHAL, S. & WIFE.*

APPEAL from the court of the sixth district.

If the testator leaves to his wife the enjoyment of his estate, and directs that, as his children shall come of age, she shall pay to each of them, the sum coming to him, out of the estate, in equal shares, to be ascertained by an inventory and appraisement, she takes the whole estate, on the appraisement, made at the time of her taking possession, and has a legacy of the *enjoyment*, or of the interest, which she should be bound to pay,

MARTIN, J. delivered the opinion of the court. The plaintiffs claim the share of Mrs. Marshal in the estate of her father, W. Wells, whose executor Mrs. Marshall, senior, is. The clause under which the claim depends, is in the following words: "My will is, to leave all my property to my children, five in number: and I appoint my wife, Rose Meuillon, their tutrix. My will is, that my wife shall have, as I give her, the enjoyment, *jouissance*, of all my estate: and as my children shall arrive to full age, my wife shall pay to each of them the sum coming to him, out of my estate, in equal shares, which will be ascertained by an inventory and appraisement.

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had not such a legacy been made.

The district court was of opinion, that "it was the intention of the testator that his wife should be tutrix of his children—that the property should remain entire in her possession—and that, as they arrived at the age of majority, she should pay them off, agreeably to the value of the estate, to be ascertained by estimation—that, by accepting the tutrixship and the property, she is bound to render an account of the fruits and revenue, and of the expenses of the maintainance and education of the defendant to be adjusted by the parish judge;" and decreed, that "the plaintiff recover one-fifth of the value of her father's estate—that is, one-fifth of the half of the whole community, together with so much as shall appear due, after the settlement of her mother's administration, and of her account as tutrix.

We are of opinion, that the intention of the testator was, that his wife should take his whole estate, on a fair and legal appraisement of it, made at the time of her taking possession of the estate—that he gave her a legacy of the enjoyment or usufruct of his estate, that is to say, of the interest which she would have been bound to pay, had not this legacy been made to her—that the present plaintiff is only entitled to one-fifth of such appraisement, out of which

any account which she may legally establish, of expenditures made for the plaintiff, is to be deducted.

The testator intended to give a legacy to his wife—and the words of his will do not appear to us susceptible of any other construction—perhaps he gave more than the disposable part of his estate—in that case, the legacy is reducible to that part, to wit, one-fifth of the estate. *Cod. Civil*, 214, *art.* 26.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the cause be remanded to the district judge, for a re-hearing, with directions to ascertain whether a legal inventory and appraisement was made at the time the estate came to the hands of the executrix, if not, what was the value of the estate at the time—and whether the legacy to the wife does not exceed the disposable part of the estate: and it is ordered, that the appellees pay the cost of the appeal.

I. Baldwin for the plaintiffs, *Murray* for the defendants.

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SMELTZER & WIFE vs. ROUTH.

APPEAL from the court of the seventh district.

MARTIN, J. delivered the opinion of the court. The defendant is in possession of a tract of land, which was once the property of persons whom the plaintiffs now represent, and which he purchased from a person who acquired it at a sale from the collector of taxes. The title is now claimed, on the ground that the sale was irregular and void, as there was no advertisement published in the newspapers, under the 18th section of the act of 1813, *ch.* 13, *Martin's Digest, verbo Land, n.* 6. The former owner of the land is admitted to be a non-resident of the parish.

The neglect of a collector to advertise in the newspaper, does not affect the sale of land for taxes.

The 12th section of the act cited, requires that at least *three weeks* public notice be given of the sale of land, for the non-payment of taxes.

The 18th section gives to non-residents of the parish the right of redeeming their lands, sold for non-payment of taxes, within a year and a day thereafter, on paying the amount of said taxes, with interest, at six per cent. per year, with all costs and charges which may have accrued, and also on indemnifying the pur-

chaser," &c. and it is made the duty of the collector of taxes to "give two months public notice in a French and English newspaper at New-Orleans, besides advertising in the parish for the same space of time in the most public places."

The 15th section of the act of 1814, ch. 21, *Martin's Digest, verbo Land, n.* 10, provides that, before collection, proceed under the 18th section of the act of 1813, to any sale, they "shall give *one month* public notice thereof, in the manner prescribed by the said act."

The only alteration wrought as to the advertising of lands to be sold for the non-payment of taxes, by the act of 1813, is an extension, in certain cases, of the *time*, viz. from *three weeks* to *one month*—the mode of advertising is not changed—*public notice* is the expression used in both acts. Printed advertisements in a gazette, and advertising in the next public place in the parish, are only required *after* a sale of land of persons not residing in the parish, in order to enable them with more facility to avail themselves of the right of redemption.

The neglect of the collector to advertise in the newspaper, does not affect the *sale*—and if the plaintiffs wish to avail themselves of a right of redemption, they must comply with the re-

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quisites of the law, claim it specifically, and give the defendant the opportunity of contesting it.

The district court erred, in avoiding the sale; it is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiffs pay costs in both courts. But nothing herein said is to affect their right of redemption, if any exist.

I. Baldwin for the plaintiffs, *Wilson* for the defendant.

PHILLIPS vs. *ROGERS & AL.*

Aliens may inherit land, in Louisiana.

APPEAL from the court of the sixth district.

Porter, for the defendants. This is an action, in which the property of the late Archibald Phillips, of the parish of Rapides, is claimed, by two different classes of heirs—by the appellant, Thomas Phillips, who is the brother of the deceased, the nearest relation in the collateral line, an alien, and subject of the king of Great-Britain and Ireland, on the one hand, and by James Rogers and others, appellees, on the other, who are admitted to be citizens of the United States, and the nearest collaterals, after the plaintiff and appellant aforesaid.

The court below gave judgment, decreeing to the heirs, citizens of the United States (the defendants) all the real estate, and to the brother, residing in Ireland, all the personal property of which the said Phillips died possessed.

From this judgment the brother has taken an appeal—and the question now to be decided on is believed to be of the first impression in this state, and of the highest importance.

As our own statutes and code are silent on the subject, to ascertain the rights of the parties here, we must have recourse to those systems of laws, which form the jurisprudence of this country, in the absence of positive provisions from our own legislature.

Let us take them from their source—and first, as to the Roman law.

"A foreigner cannot take property by inheritance." *Dictionaire du Digeste, verbo Etranger, ff.* 28, 5, 6, *n.* 2, *id.* 59. *n.* 4.

The above authority is decisive, unless the plaintiff can shew that different regulations have been established in Spain; but so far from the common law of that country having been changed or altered in this respect, we shall find, on examination, that, in common with every other country in Europe, they have embodied

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in their legislation this maxim of Roman jurisprudence.

Following the example of ancient nations, France, and almost every other country in Europe, have adopted the *droit d'aubaine*. *Encyclopedie, verbo Aubaine.*

Nobody denies that the *droit d'aubaine* is established in France, and in the neighboring kingdoms, and indeed among most civilized people. 3 *D'Aguesseau*, 120, 32*d. plaidoyer.*

According to some authors, the establishment of the *droit d'aubaine*, as it is known to us at this day, dates as early as the fourteenth century. Edward, king of England, is said to be the first who prohibited aliens from inheriting. France followed the example, and extended the prohibition to real and personal property. Neighboring nations did the like, and the *droit d'aubaine* was established through Europe. 1 *Denisart*, 517, *verbo Aubaine.*

These authorities, entitled, as they are, to the highest respect, prove how universally the right prevails in Europe—let us now examine how the law stands in Spain.

With the like view of retaining wealth in Spain, Alonso, the wise, forbade the alienation of property, *inter vivos* or *causâ mortis* to foreigners. 5 *Elizondo, Pract. un. for.* 196.

In the spirit of the law of king Henry, our brother, made at Cordova, in 1455, we declare, that we do not intend to give to any king, or any other person, out of our kingdom, any city, town, castle, place, land or hereditiment, nor island. *New Recop.* 5, 10, 2.

The donation made to any alien, out of our kingdom, of any city, town, castle or hereditament, shall not be valid. 11 *Theatro de la legislacion*, 245, *Ordinamiento real*, 5, 9, 10.

Letters patent, in the form of an edict, of July, 1762, recorded in the parliament of Paris, on the 3d of September following, provide that the subjects of the kings of Spain and the two Sicilies shall not be deemed *aubains* in France, nor the French in Spain, the Sicilies, and Naples—and that, for this purpose, the *droit d'aubaine* remain abolished, as to every kind of property, without any exception. *Denisart*, 9th edition, 1771, *verbo Aubaine*.

The defendants feel convinced that these conclusive authorities establish the doctrine for which they contend. If such a principle had been common to both France and Spain, it would have been unnecessary to abolish it for the future.

It only remains to consider whether there were any provisions in the Spanish colonies in regard

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to this subject different from the laws of the mother country—and here it might be sufficient for the appellees, after shewing how the law stood in old Spain, to call on the appellant to prove the exception in respect to her American provinces. But as positive law is to be found, even for those provinces, it may be as well by a recurrence to them to place the question beyond doubt.

The edict already cited has proved this. It provides for abolishing the *droit d'aubaine* through the whole extent of the Spanish monarchy. Now if it did not exist through the whole extent of the monarchy, why provide for its extinction?

But, a reference to the laws of the Indies will shew that there is nothing in that code made expressly for the Spanish provinces, different from the laws of old Spain on this subject. On the contrary, its provisions recognize the regulations of the mother country, and enforce them. We find that foreigners are prohibited from settling in the colonies. Exceptions are afterwards made in favor of those who may obtain a special licence, and subsequently we find even that permission repealed. *Recop. de las leyes de las Indias*, 27, 9. It is difficult to believe that a government so jealous of the introduction of strangers into their American pos-

cases meant to extend to their heirs greater privileges than they had in the mother country. A further examination of these laws, however, negatives completely the idea.

Testamentary executors, heirs and holders of property of deceased persons, who, in obedience to a testament, are bound to deliver the estate, or any part of it to persons who dwell in one of these kingdoms, shall be bound &c. *Leyes de las Indias*, 2, 32, 46. The conformity of the two systems is placed beyond a doubt, by the next extract. We order and command our viceroys and audiences that, if any lawful persons, with proper documents, present themselves, to collect the estate of any person, dying in the Indies, it may be decreed to them, they not being aliens, nor the property of aliens to our subjects. *Id.* 2, 32, 44.

These provisions were well understood in the Spanish colonies, and accordingly we find that Gayoso, governor of the province of Louisiana, in conformity thereto, provided, in his regulations for the allotment of lands—"In case of death he, the grantee, may leave them to his lawful heirs, if he has any resident in the country, if he has no such heir in the country, they shall in no event go to an heir who is not of the country, unless such heir shall resolve to come

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and reside in it conformably to the establish conditions. *Laws U. S.* 543, *n.* 15. The d fendants feel that they could add much c to the number of these authorities than incre their force, and in this persuasion the are merely referred to *Rogers* vs. *Beill Martin*, 66 , where this court hold that governors of Louisiana, under the Spanish go ernment, were invested with legislative auth ity—if they were, in such a case as was pres ed for decision, then how much more are the edicts entitled to respect on a subject such this, when the law they promulgated d nothing more but enforce that of the mo country, nor, as it has been said, is there a hardship in this, their principles are founde on the doctrine of reciprocity. A citizen of th United States at this day could not take or hold lands by inheritance in the country where the appellant resides; why then should a subject of the king of Great Britain have such a privilege here?

The authorities quoted by the plaintiff from the *Recopilacion de las Indias*, by no means destroy the doctrine which we contend for. That found in *lib.* 8, *tit.* 27, *law* 31 33. provides for foreigners naturalized by twenty years residence, ten of them holding immoveable prop-

or marrying with a native, or daughter of a foreigner born in Spain or the Indies, and say that with this residence and certain other formalities, letters of naturalization shall be given to them. But Philip, the ancestor, here was not in that situation either by residence or marriage: the authority, therefore, has no application to the case before the court. The principle contained in the law read from the same work, *lib.* 8, *tit.* 27, *law* 32, supports the right of the appellees. It provides that those who may have performed important services to the monarchy, shall be naturalized and enjoy several important privileges. What is this but an exception which proves the principle for which we contend—for, if the law was, as they insist, where would have been the necessity for a particular provision in favor of those who rendered important services in favor of the monarchy? In regard to what is stated by Solanzano, in his *Politica Indiana*, it is sufficient to say, that, it is in direct opposition to the positive laws of Spain, as has been already shewn to the court.

If the court should come to the opinion, that the defendants have established the principle, that the heir, who is a foreigner, has no right to inherit, it only remains to consider if the ap-

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pellees, as the next in the order of succession, have not a right to receive the property. On this subject, it is presumed, there can exist little doubt. The brother is considered as if he did not exist—the court cannot recognise him in a capacity to inherit. The law takes no notice of him, unless to reject his claim, if he presents himself in character of heir. The appellees, of course, have a right to the inheritance, no other collaterals nearer in consanguinity existing, to take the property. Again, if they cannot inherit, no other can, as our statute provides that, "in defect of *lawful relations*, or of a surviving husband and wife, or acknowledged natural children, the estate belongs to the territory." *Civil Code*, 150, art. 41. This defect does not exist here, as there are lawful relations in the United States, capable of taking the property. Upon the whole, it is concluded, with great confidence, that the appellant cannot recover, and that the district court committed no error, except in decreeing to him the amount of the moveable property, of which the intestate died possessed. From the authorities referred to in this statement, and on which the defendants rest their claim for success, it appears that a foreigner cannot inherit either moveable or immoveable property. Judgment,

It is therefore hoped, will be rendered in favor of the appellees, for the whole amount of the property, of which A. Phillips died possessed.

Workman, for the plaintiff. The sole question in this case is, whether an alien can inherit immoveable property in the state of Louisiana?

When this question was first proposed to me, I conceived that it was at once decided by the provisions of our civil code. A different opinion being strenuously maintained by lawyers of great talents and learning, a full investigation of the subject becomes necessary.

Our adversaries have probably been misled by not attending to the difference between the principle which prevailed in the free states of antiquity, and the modern principle, as recognized throughout the civilized world, respecting the rights of foreigners.

Antiently, it was an established maxim of jurisprudence, as well as of politics, that foreigners were entitled to nothing, except in virtue of a solemn treaty, or a positive law. From every thing not thus conceded or secured to them, they were held to be absolutely excluded. You might lawfully make war upon all those foreign states, with which you had not entered into a treaty of peace. So generally was this princi-

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ple known and established, that the greatest of all moral philosophers, Aristotle, treats of piracy, or as we should term it, privateering, as an usual and lawful calling.

The Greek republics, from which Rome is believed to have received the elements of her jurisprudence, were extremely jealous, and even what we should deem illiberal, as to the participation of their civic rights. In Athens, indeed, during the infancy and early growth of the state, we are told by Thucidides, *book* 1st, *Introduction*, that many of those who were driven from the other parts of Greece, by war or sedition, betook themselves to the Athenians for secure refuge, and, as they obtained the privileges of citizens, continued to enlarge that city with fresh accession of inhabitants, insomuch that at last Attica, being insufficient to support the number, they sent over colonies into Ionia. But this wise and liberal policy ceased with the necessity which had occasioned its adoption. The political laws of Athens respecting foreigners, were soon assimilated with those of the other Grecian states. Not only the right of voting in their assemblies, and of holding posts of trust and honor, but the right of purchasing or inheriting immoveable property, the right of marriage, the right of com-

merce, and even the right of legal residence, were withheld from all, except their own citizens, or those on whom those rights were bestowed as a great favor and special privilege. Such exclusions ought not to surprise us, when we consider the nature of the governments of most of those celebrated states. Those governments were democracies, in the strict sense of the word. All the great, the gratifying and seducing powers of sovereiguty were exercised by their citizens in their own proper persons—their political rights were not confined to abusing a magistrate, bawling at an election, or throwing a piece of papyrus or an oyster shell into an urn: they raised fleets and armies—they appointed and removed generals and admirals—they made war and peace, at their pleasure—they were addressed, courted and flattered to their very teeth, not merely by their own ministers and orators, but by the representatives of the greatest kings, and the ambassadors of the most powerful nations. No wonder then that they were so parsimonious in the participation of such flattering privileges. A citizen of Athens—the queen of a thousand cities—might be considered as great a personage, in those days, as a small German prince would be in our own, and he was equally proud of his

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dignity and importance. The Romans were not less disposed than the people of Greece, to monopolize their civil and political rights. In the infancy of their state, necessity made them also liberal of naturalization. While they dreaded the vengeance which their outrages had provoked—while the imperial banditti, destined to subdue the world, were yet few in number, and struggling for existence, they freely admitted the natives of every country, and the robbers of every gang, to partake of their dangers and their booty. But by the time they adopted from Greece the laws of the twelve tables, they adopted also the excluding policy of the Grecian republics. To the Roman citizens belonged exclusively the right of voting in the different assemblies of the people, the right of holding the public offices of the commonwealth, the right of participating in the sacred rites of the city, the rights of intermarriage with a Roman citizen, of high parental authority, of making a testament, and of succeeding to an inheritance.

The exclusion of foreigners from the right of making a will, and of inheriting property, is often alluded to, and seems to have been generally taken for granted, during the period of the Roman republic, and for a considerable time after the establishment of the Imperial govern-

sent. And yet this exclusion did not arise from any positive law, but from the excluding principle, which I have already mentioned, of the ancient jurisprudence; that no civic rights could be claimed or exercised, but by those to whom they were positively and specifically granted. Cicero tells us that "*Peregrini vel advenæ & hospites non sunt cives; nec testamenti factionem habent; nec est eorum testamentum justum, quia non sunt indigenæ; sunt extranei, sic dicti quasi alibi nati.*" *Lib.* 2, *de officiis.* This is very like what is unhandsomely and ungallantly called the ladies reason: foreigners cannot make a will, because they are foreigners: the true reason was because the making of a will was held to be a civil, and not a natural right, and that there was no positive law of Rome authorizing foreigners to exercise that right. There are laws, indeed, from which their exclusion from the exercise of that right, as well as from the right of inheritance, is spoken of, or may be obviously inferred. Thus in the digest it is said, "*Solemus dicere, media tempora non nocere: ut puta civis Romanus heres scriptus, vivo testatore factus peregrinus, mox civitatem Romanam pervenit, media tempora non nocent.*" *D.* 28, 5, 6, 2. Again, in the same book and title, law 59, par. 4—"*Si heres institutus scri-*

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bendi testamenti tempore civis Romanus fu[erit], deinde ei aqua & igni interdictum est, heres [fit] si intra illud tempus quo testator decess[it] redierit.

The same doctrine is still more plainly recognized in the code, *lib.* 6, *tit.* 24, *l.* 1, which is in these words: "*Qui deportantur, si heredes scribantur, tanquam peregrini, capere non possunt; sed hereditas in en causâ est, in qua esset, si scripti heredes non fuissent.* Thus stood the Imperial law, in the time of Titus Ælius Antoninus; and so many suppose it remained to the end. But, on continuing to examine the body of the law itself, we shall find that a total change in the system of exclusion at last took place. The law to which I refer is as follows: "*Omnes peregrini, et advenæ liberè hospitenter ubi voluerint. Et hospitati si testari voluerint, de rebus suis liberam ordinandi habeant facultatem, quorum ordinatio incussa servetur. Si vero intestati decesserint; ad hospitem nihil perveniet. Sed bona ipsorum per manus episcopi loci, si fieri potest, heredibus tradantur, vel in pias causas erogentur.*" C. 6, 59, 10. *In anthent. nov. de stat. et consuet. § omnes peregrini, &c.*

"Let it be permitted to all foreigners and strangers to lodge freely where they shall think

fit; and if they wish to make a testament, let them have the faculty of disposing of their property, and let their will in this respect be inviolably observed. If they die intestate, no part of their succession shall belong to their host; but their property shall be delivered up by the bishop of the place to their heirs, or if this cannot be done, it shall be appropriated to pious purposes."

This law, it is true, does not go so far as to allow aliens to inherit the property of Roman citizens. (See *Heineccius, on the Roman civil law, n.* 538.) But this, as we shall soon see, is not at all material to our case. That is amply provided for by the Spanish law and our own statutes.—The final subversion of the Roman empire was followed by a new and extraordinary order of things, among the states that grew out of its ruins. The feudal system, in a word, was generally established throughout Europe. The rude legislators and conquerors of the north knew not how to reward their followers, or secure their conquests, otherwise than by dividing the conquered lands and people among them, on the tenure of allegiance and military service. Landed property was thus erected into a political benefice: though bestowed in general as a reward for services rendered to the

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donor, its profits and advantages were all considered as the wages of an office, for the performance of which allegiance was indispensably requisite. It followed, of course, that no one could lawfully hold land, unless he was qualified to hold the office of which it was the salary, and the duties of which that land was given to enable him to fulfil: and hence aliens were prohibited from acquiring, either by purchase, gift or inheritance, that species of property. Thus the excluding principle of the Greek and Roman republics, was adopted by most of the half barbarous monarchies of the middle age.

Yet were there many exceptions to this rule of exclusion. Aliens were often permitted to acquire fiefs, provided they took the oath of fidelity to the Suzerain. In some of the southern states of Europe there was much of the land which was not held by feubal tenure, but continued *allodial*. In Spain, particularly, the Roman law maintained under the governments of all her Gothic invaders, a divided empire with their feudal codes; a fact which is apparent in most of the titles of the Partidas, and which, in the present case, it is very important to investigate.

But before I examine and explain the Span-

lish law of inheritance, respecting foreigners, it will first be proper to dispose of some of these quotations, brought forward by the opposite party, and dignified with the name of authorities.

The *Encyclopedie Francaise*, they tell us, declares, that "*à l'example des peuples anciens, le droit d'aubaine s'est introduit dans la France, et dans toutes les contrées de l'Europe.*"

They also cite Denisart's dictionary, which says—"*et bientot le droit d'aubaine fut etabli universellement en Europé;*"—and D'Agues-seau, who remarks, "*personne ne revoque en doute que le droit d'aubaine ne soit etabli en France, comme dans les royaumes voisins et dans la plupart des nations policées.*"

Are such notices as these deserving of attention, when the question concerns not foreign laws, but laws which are, or lately were, the laws of this country? What would be said in the supreme court of the United States, or in Westminster Hall, if things like these were offered as legal authorities—if, on a doubtful point of common law, or an obscure act of congress, the advocates were to refer to the compilations of Dr. Rees or Dr. Brewster, instead of the great luminaries of our jurisprudence? What should we think of him who, on a ques-

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tion of French laws, or French usages, would quote the foul-mouthed Jedediah Morse, who asserts in his work, entitled *The American Universal Geography, p. 265, (edition of* 1812,) that "the French, as a nation, are at present, by the confession even of sober and discreet Frenchmen, false and faithless, revengeful and sanguinary. The law of divorce has rendered marriage the mere cover for prostitution—and France presents at this moment the picture of one great common brothel, in which every variety of lewdness is indulged, without shame and without restraint." Even the French Encyclopedia is stained with some gross errors, when it treats of foreign nations. In fact, almost all works, especially those of the popular sort, that treat of the laws, manners or customs of foreign countries, are strongly characterized by the uncharitableness, hatred and malice which the people of different nations seem so fond of entertaining for each other. As to the opinion of D'Aguesseau, it is so guarded and restricted as to be of no use to those who offer it, if D'Aguesseau himself were of any authority as a Spanish jurisconsult.

Reference is made to certain letters patent, which recite a treaty made between France and Spain, in which it was provided, that the

droit d'aubaine should not operate in either country, with respect to the subjects of the other. But I can by no means admit the inference drawn from this stipulation, to wit, that if the *droit d'aubaine* did not exist to the same extent in both countries, there would have been no occasion to provide that it should be abolished in both for the future. Stipulations of this kind in treaties are almost always made mutually and reciprocally between the high contracting parties, for the following obvious reasons:

1. Because this reciprocity is deemed more suitable to the dignity of those parties, than if one of them only were to engage to do or not to do any thing, while the other party were left to do it or not, as he might think fit. This last would be what is termed an unequal, and, therefore, to one of the parties, a degrading treaty.

2. Because, on the principles of that universal law, which furnishes the rules for interpreting treaties, as well as all other contracts, every promise or stipulation should have some lawful consideration to support it. And

3. Because such stipulations bind the parties to preserve those laws which otherwise they might alter or repeal, at their pleasure.

In the treaty in question, the stipulation on the part of Spain, would prevent her sovereign

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from establishing any *droit d'aubaine*, as against Frenchmen, if he were even disposed to do so; or if he did establish such a law, it would at least expose him to war and the just penalties of violating a solemn treaty.

A reference to many of our own public treaties will shew the absurdity of our adversary's argument on this point. In the treaty between the United States and Prussia, it is stipulated, *art.* 9, *(vid. laws of the United States, vol. 1, p. 249, Colvin's edition)* that "the ancient and barbarous right to wrecks of the sea, shall be entirely abolished, with respect to the subjects or citizens of the two contracting parties." And yet, who ever heard of such a right existing in these United States? In the next article of the same treaty it is provided, that "the citizens or subjects of each party, shall have power to dispose of their personal goods within the jurisdiction of the other by testament, donation or otherwise." According to the counsel's reasoning, it might hence be inferred, that the *droit d'aubaine* operated in the United States, with respect to *personal property*—the contrary of which is notorious.

In our treaty with Spain, *art.* 7, it is stipulated that "in all cases of seizure, detention or arrest for debts contracted, or offences commit-

ted, by any citizen or subject of the one party, within the jurisdiction of the other, the same shall be made and prosecuted *by order and authority of law only.*" Who ever heard that a Spaniard was ever liable, in the United States, to be arrested for debts or offences, otherwise than by order and authority of law? Multitudes of such passages might be cited from such compacts between governments of different kinds, and having different codes of laws, and different usages, to prove the fallacy of the corrollary drawn from the treaty adduced by the counsel.

Let us now inquire what the Spanish law is, on this important subject, not from the compilations of foreign ignorance or jealousy, but from the code of Spain itself; not from Elizondo, nor Frebrero, nor the Theatro de la Legislàcion, but from the Partidas, the Recopilacion, and the Autos Accordados; the uncorrupted fountains of the Spanish law. It is ordained, *Partida*, 6, *tit.* 3, *l.* 2, that any person whatever may be instituted an heir, who is not prohibited by law from being so. "*E brevemente dezimos, que todo ome, a quien non es defendido por las leyes deste nuestro libro, quier sea libre o siervo, puede ser establecido por heredero de otri,*" &c. "We say, briefly, that every man, to whom it is not forbidden by the laws of this book, who-

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ther he be a freeman or a slave, may be instituted as the heir of another." In the fourth law of the same book and title of the same code, *twelve* classes or descriptions of persons are enumerated, who may not inherit. *Foreigners are not among the number.*

The *4th Partida, tit. 4th, law 2d.* enumerates the various modes of acquiring naturalization. Among these, the 6th mode is *by inheritance*. "*La sexta, por heredamiento. Part.* 6, *tit.* 1, *law* 13, declares and specifies the descriptions of persons *who may not make a testament—foreigners are not among the number. Part.* 6, 1, 30. *Los peregrinos tienen libre facultad de hacer testamento, &c. Compendio, &c.* 1, 30. The succeeding law of the same title, makes it the duty of the diocesan bishop, or his vicar, to take care of the property of strangers and pilgrims, for their heirs, and to write to them, that they may come or send for such property. And if the heir neglect to come or send for it, it shall be employed in pious uses. These laws are taken from the *authentic*, already quoted, "*omnes peregrini.*"

But, were there no exceptions, no modifications of this extraordinary liberality of the Spanish law towards strangers and aliens? There were: and the court shall see the natur

and extent of them. It was enacted by Don Alonzo IX. *law* 3, *tit.* 27, *Ordenamiento de Alcalà*, and by Henry IV. in the cortes of Cordova, that no donation made by the sovereign to any other king or kingdom, or to any foreigner whatever, of any city, castle or royal jurisdiction, should be valid. This law, quoted by the adverse party, from the *Theatro Universal*, is recited very fully, and re-enacted, or confirmed, by the 1*st law*, *tit.* 10, *lib.* 5, of the new recopilation, which is, *l.* 6, *tit.* 5, *book* 3, of the *latest recopilation of* 1805. The second law of the same book and title, goes much further. It ordains as follows: "*Siguiendo la ley preedante, declaramos dar ni hacer merced á rey, ni á otro persona extrana de fuera de estos reynos, de ciudades ni villas, ni castillos, ni lugar, tierra ni heredamiento, ni islas de nuestro corona real, ni permitir ni dar lugar que tal se haga: y asi lo seguramos por nuestra verdadera fe y palabra real: y defendemos, que ningunos ni algunos de nuestros subditos y naturales no sean osados de dar ni vender, ni tracar villas ni lugares ni castillos, tierras ni heredamientos, ni islas de nuestros reynos à rey ni à senor, ni otra persona extrangera de fuera de nuestros reynos, so pena de la nuestra merced.*" "In pursuance of the preceding law,

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we declare, that we will not give, nor allow to be given, to any king or to any foreigner whatever, any cities, towns, castles, places, lands, inheritances, or islands belonging to our royal crown: and so we pledge our true faith and royal word. And we forbid all and every of our natural born subjects to *give*, or sell, or *exchange* any towns, places, castles, lands, inheritances or islands of our kingdoms to any foreign king, lord or other person, on pain of being dealt with according to our pleasure."

As this is the law principally relied on by the adverse party, I have quoted it at full length. But, is it not evident, at the first view of this statute, that its great object is to preserve the rights and seignories of the crown—that the prohibition of alienation which it contains, extends only to property of a feudal nature, to which there belong privileges and jurisdictions unfit for an alien to enjoy or exercise? The word *inheritance* is indeed used; yet we may remark, that the prohibition is confined to *giving*, *selling* or *exchanging*. Surely an ordinance so very loosely penned, and which does not once mention *devise*, or *the right of inheritance*, could never be construed to repeal, by mere implication, as it were, the very solemn, positive and precise laws I have already cited.

But if even such a construction were possible, it could not avail the other party; for we find, on proceeding a little further in this law, that, though the alienations in question to foreigners are forbidden, they are *not void*—they only subject the offending persons to a penalty; and that penalty, which this law leaves at the king's discretion, is fixed precisely by the first of the *autos accordados*, annexed to the title of the *Recopilacion*, in which the law itself is contained. This *auto* is *law* 12, *tit.* 5, *book* 1, of the *Novissima Recopilacion*, 1805—it is as follows: "*Ordenamos &c. que qualquier lego y otra persona sujeta á nuestra jurisdiccion real, que donaren ó vendieren, ó en otro qualquier manera enagenaren por qualquier titulo qualquier heredamiento ó otros bienes raices á universidad ó colegio, á persona ó personas exêntas que no sean de nuestra jurisdiccion real ni sujestas à ella, sean tenidas de pagar, y paguen a nos la quinta parte del verdadero valor de las tales heredidades, &c. y esto demas de la alcabala que nos pertenece,*" &c. "We ordain, that whoever shall give, or sell, or transfer in any other manner or by any title whatsoever, any inheritance or other real property to any university, college or person, not belonging to our regal jurisdiction, nor subject to it, shall be

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held to pay to us the fifth part of the true value of such inheritances or other property, &c. over and above the ordinary *alcubala*." So then the law on which our adversaries confidently rely, as making void all donations and devises of lands to aliens, does in fact, when explained by this *auto accordado*, fully authorize and confirm all such donations and devises, on the condition of the payment of a duty of twenty per cent. in addition to the ordinary duty on the sales and transfer of lands, which, I believe, is only five per cent. on their full value.

The appellee next cites the laws of the Indies. *B.* 2, *t.* 32, *laws* 44 *and* 46. By these laws it is forbidden to deliver up the property of deceased persons to foreigners: in a word, foreigners are not allowed to be *depositaries* or *curators* of the vacant estates of intestates; a provision not unwise or extraordinary, considering that few foreigners were admitted into Spanish America, and that even of these, but a small number were permitted to carry on commerce, or exercise any lucrative or honorable profession.

But this citation is extremely unfortunate for those who have made it. For it naturally draws our attention to the preceding law, (44) which has this important enactment: "*Pero si*

á que muriere dexare memoria en forma de testamento, que se ha de verificar con testigos, ó, siendo extrangero, hiciere testamento, aunque dexe herederos en estos reynos, toca el conocimiento de ellos à la justicia ordinaria." "But if the deceased shall leave any memorial in the form of a testament, which requires to be proved by witnesses, or if, *being a foreigner*, he shall make a testament, the cognizance of the succession, even though the testator should leave heirs in these kingdoms, belongs to the ordinary tribunals of justice." This law, the court will remark, is regulating the competency and jurisdiction of certain courts of justice; and we find that it recognizes, as a matter of notoriety, the right of foreigners *to make wills*, and the right of their heirs, in or *out of the Spanish kingdoms*, to inherit: for such is the obvious construction which the word *aunque* indicates. The provision of the 32d law, title 27, ninth book, of the same code, is yet more completely decisive in our favor.—*Y declaramos por lo que toca á la de tener bienes raices los estrangeros para adquirir naturaleza, &c.—Que sea en cantidad de quatro mil ducados proprios, ó adquiridos por via de herencia, donacion, compra, &c.* "We declare, with respect to the real property which foreigners must hold, in order to be qualified to

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obtain naturalization, that it must be of the value of four thousand ducats, whether originally their own, or acquired by way of *inheritance*, donation, purchase," &c. Beyond this, nothing can be required. To prove that the Spanish law of inheritance continued, as I have shewn it to be, from the *Partidas* and the new *Recopilacion*, I refer the court to the professor, Don Juan Sala's *Illustration de Derecho, vol.* 1, *p.* 19 & 148; and to another institutory work, by *Asso and Manuel, p.* 23. The first of these works is one of the best of its kind, that I have seen. It was published—at least my edition of it—in 1803. Asso and Manuel's book appeared in 1805. It is of inferior merit to the other; but neither of them could be mistaken, on a subject so important and well known as the law of inheritance.

To satisfy the court still further on this point, I refer them to the *Novissima Recopilacion*, published in 1805, in which are incorporated all the *cedulas, pragmaticas*, decrees, laws and ordinances, of a general nature, which had been promulgated up to the year 1804. In *tit.* 11, *book* 6, *vol.* 2, *p.* 165, of this comprehensive digest of Spanish statutory law, will be found various provisions respecting foreigners, none of which derogate in the least from those of the

Partidas. One of the laws, the second of this title, contains this extraordinary proviso, which the liberality of former laws had perhaps made requisite—that English and Irish Catholics should *not* enjoy in Spain any other privileges than those of the native Spaniards. What reflections must such a law excite in the minds of the Catholics of Great Britain and Ireland, who have been fighting the battles of a government that rewards them for their services with disfranchisement and degradation.

The regulations of governor Gayoso, for the allotment of lands, are referred to and relied upon by our adversaries. Without inquiring whether the Spanish governors of Louisiana were invested with legislative authority, it will be sufficient, in the present instance, to shew that the regulations in question do not contain any thing subversive of the Spanish law, as I have stated it to be. When donations are made, the donor may annex to them whatever reasonable conditions he thinks fit. The lands to which alone Gayoso's regulations were applicable, were granted *gratuitously* by the government. There was nothing then illegal or unreasonable in prescribing the mode or conditions on which those lands might be disposed of by the grantees. If they did not like those condi-

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tions, they need not accept of the property. If the Spanish law were conformable to Gayoso's regulations, why was it deemed necessary to state it in them? Those regulations are of a special, not a general, nature. They had no more to do with the law of inheritance, than with the law of purchase and sale, unless it was intended by them to deviate or derogate from the established law. And that such was their intention and object is obvious from the first part of the article, (the 15th,) from which the opposite party have quoted such an extract as they thought would suit them. The words of that part of the article I refer to, are these: "He (the grantee) shall not possess the right to *sell* his lands, until he shall have produced three crops, on the tenth part of his lands, which shall be well cultivated." *See Laws of the United States, vol. 1, p. 543.* The regulations, then, limit the grantee's right of selling, as well as the right of devising his property. From the ordinance that the particular lands in question shall in no event go to an heir who is not of the country, the counsel infers that, by the law of Spain, no alien can inherit any land whatever. By the same kind of logic, it would follow, from those regulations, that no one, (foreigner or citizen,) could, by the Spanish law, sell his lands,

until he had produced three crops on the tenth part of them.

Solanzano, in his *Politica Indiana*, recommends the adoption of the *droit d'aubaine*, so that foreigners may no longer inherit the property of the native subjects of Spain. But the authority of this writer is objected to—I do not rely upon it, or want it. I rely upon the codes and statutes themselves, not upon any commentators whatever. Commentators may be advantageously consulted when the interpretation of a law is doubtful; but when the law is as clear as I take that of the present case to be, no comment or glossary is requisite to explain it.

That the law of inheritance was as I have stated it to be, in Louisiana, during the time the colony continued under the dominion of Spain, is a fact of general notoriety, a fact for the truth of which I can appeal particularly to one of the members of this honorable court, judge Derbigny. Foreigners, of various countries, were allowed to dispose of their property by will, and to inherit property here. This is the first time I ever knew their rights in this respect to be denied or questioned. If the general law of Spain were as the other party misrepresent it, the long-established and uninterrupted custom of Louisiana would modify that law in

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this country. Custom is the un-written law used for a long time. *Part.* 1, 2, 4. It must not be absurd, nor contrary to natural right, or the common welfare, nor be introduced through error. Custom is the interpreter of the law; it corrects the ancient law, if it is general; but if it is special, it corrects the law only in the place in which it is observed, if the sovereign knows of it, and does not oppose it for the space of ten or twenty years. *Part.* 1, 2, 5 and 6. This in the digest *de Legibus*. *D.* 1, 3, 32. An ancient custom is observed with reason as a law: it is called the customary law. For, inasmuch as the laws are binding upon us only from their being received by the opinion and consent of the nation, that which the people have approved of, though un-written, should be binding upon all. And it is, therefore, rightly established, that laws may be abrogated, not only by the will of the legislator, but also by disuse, approved of by the tacit consent of the whole nation.

But, whatever may be the law of inheritance of Rome, or of Spain, or of the late province of Louisiana, the point now in dispute is decided completely in our favor, by the provisions of the civil code of the commonwealth of Louisiana. This code, the court well know, is for the fu-

greater part, a transcript from the *Code Napoleon*, or, as it is now termed, *Le Code Civil Français*. To understand our code thoroughly, we must often investigate the French law as it stood before the revolution; and we must then compare the two codes together, to see how far they agree, and wherein they differ from each other.

The *droit d'aubaine*, it is certain, was in full force in France, until the fall of the old monarchy. It was abrogated by the decrees of the constituent assembly, in 1790, and 1791; and those decrees were confirmed substantially by the second chapter of the 1st title of the 3d book of the Napoleon code. This chapter, though it is entitled, *Des qualités requise pour succéder*, treats chiefly of those who may not succeed, or inherit; it being, of course well understood, conformably to the great principle of jurisprudence established throughout Christendom, that every one may inherit who is not expressly prohibited or excluded from the right of inheriting. The first article of this chapter—the 725th article of the code, ordains that, "to succeed, it is necessary to be in existence at the moment of opening the succession.—Those, therefore, are incapable of succeeding—1. He who is not con-

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ceived—2. The infant born incapable of living—3.—He who is dead in law, *(mort civilement.)*

These few exceptions, would, on the well known principle I have just stated, leave the right of inheriting property in France open to persons of every country, color and cast. But the framers of the Napoleon code, on mature reflection, were of opinion that this absolute, unqualified confimation of the repeal of the *droit d'aubaine*, was neither just nor politic, considering that that odious law of exclusion still subsisted, with more or less of atrocity, in many of the nations of the world. Why should a foreigner be permitted to inherit property in France, when a Frenchman could inherit nothing in that foreigner's country? France was not, like America, in want of population, nor had she an acre of land to spare. For this reason the 726th article was introduced; by which it was provided that "a foreigner is admitted to succeed to the property which his relation, whether a foreigner or a Frenchman, possesses in the territory of the empire, only in the case, and in the manner in which a Frenchman might succeed to his relation possessing property in the country of that foreigner, conformably to the dispositions of the 11th article "of the title *on the enjoyment and privation of civil rights.*"

The 11th article thus referred to, enacts that "every foreigner shall enjoy in France the same civil rights as those which are, or which shall be allowed to Frenchmen by the treaties of the nation to which that foreigner shall belong."—By these articles we see that no foreigner can inherit any property in France, unless in virtue of a treaty which would allow a Frenchman to inherit the same kind of property in that foreigner's country. Such is the construction given to those articles by the best French commentators, and by the French tribunals. Without these two articles, the old *droit d'aubaine* would have remained completely abolished in France. Now, neither of these two articles, nor any thing like either of them, appears in our civil code; while its general provisions on the qualifications requisite for inheriting are still more clear and strong than those of the French code. Our code proclaims *(p. 158, art. 64)* that "all free persons, even the minor pupil, the lunatic, and the like, may transmit their estates *ab intestat*, and inherit from others. Slaves alone are incapable of either." Our legislature do not, like the framers of other codes, give us a mere negative declaration of those who may *not* transmit their estates, or inherit the property of others, and

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leave us to the inference which our jurisprudence would thence draw in favor of all who were not thus specifically excluded: but they do *affirmatively and most positively* enact that *all* free persons may transmit and inherit estates, without making any distinction whatever as to the kinds of property, whether real or personal, moveable or immoveable, of which such estates may consist. If the *droit d'aubaine*, or any thing like it, existed in this country previous to the promulgation of our civil code, it was not possible for any legislative art, care, or providence to have destroyed that *droit d'aubaine* more completely and effectually than our civil code has thus done.

The omission, in the redaction of that chapter of our civil code which establishes the right of inheritance, of those articles of the French code which, in a certain degree, revived the *droit d'aubaine* in France, was evidently the result of design and deliberation. Our legislature, guided by the principles of a policy equally wise, liberal and provident, perceived clearly that the adoption of those excluding articles of the code Napoleon, however suitable they might be for France, would have been pernicious in Louisiana. Our staple commodity is land. We want purchasers for this property,

and freemen to encrease the strength of our independent and glorious commonwealth. We know by experience that whoever is interested in our soil, will be faithful to our state. Let a foreigner, of whatever nation or political sect, however hostile to our country and institutions, be put in possession of a good plantation on the banks of the Mississippi, and a sense of his own interest, constantly operating on his mind, will cure him of all his political and national prejudices, however strong and inveterate they may be. His estate makes him a patriot, whether he will or no. The attachment he feels for his property, (and we all know how strong that generally is,) will be transferred by an easy and inevitable association to the government, and the laws that protect it; and thus he becomes of necessity a friend and supporter of order, of justice, of the country. It is no merit for an inhabitant of Louisiana to adhere zealously to its government. In doing so, he only does what his own interests and those of his family require. To be a traitor to a country in which every freeman may enjoy all that any reasonable man can desire, is to be at once both fool and villain.

The sentiment of interest is, I conceive, the surest bond by which to attach the native of

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one country to the government of another. It is the best, if not the only substitute for those early, and dear, and cherished associations which produce the filial affection of patriotism, and which bind men, as by the force of a natural and innate passion to COUNTRY—that beloved, and venerated, and adored Being which the imagination elevates to a rank between God and man.

A large portion of our population must, for a long time, be composed of the citizens of other states, and the natives of foreign countries. To expect from those emigrants the natural, habitual patriotism I have just spoken of, would be too much. Their attachment to their new country will be best secured by enabling them to become deeply, permanently and self-evidently interested in its welfare. Perhaps, indeed, the patriotism which is, on the whole, the most substantially advantageous to a community, is that which has individual interests for its basis. When men perceive that the prosperity of the republic is identified with their own, they labor in the public cause with all the ardor, and energy, and perseverance of self-love. Their exertions are not like those of mere unsupported enthusiasm, few, temporary or capricious, but continued and uniform. A perfectly disinterested patriot, is

these unchivalrous, calculating times, might be, like a Platonic lover, of very little use to the object of his affections. The government of Louisiana is too wise to rely on the romantic attachments of her people. The laws of Louisiana, by throwing open widely the doors of purchase and inheritance, have furnished to all her free inhabitants, wherever they come from, the most powerful incentives to useful industry, and the most solid and durable foundation for rational patriotism.

The judgment of the court below has, perhaps, been founded on the law of England—a law which, as it has been adopted on this subject in the other states of the union, ought, it may have been supposed, to be adopted in Louisiana also. How that law has come to be so generally established in the United States, appears to me quite unaccountable. The law of England, prohibiting aliens from holding real property, is founded on the feudal system, to which we have nothing in these states bearing any resemblance. "Under the feudal system, (*B. Comm.* 4, 886,) every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them: and there was a mutual trust or confidence subsisting between the

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lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him; and on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or *fealty*; and the oath of fealty was required by the feudal law, to be taken by all tenants to their landlords, which is couched in almost the same terms as our ancient oath of allegiance; except that, in the usual oath of fealty, there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgement was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception." Now, all lands in England are supposed to be held mediately or immediately from the king. Allegiance to him—which an alien of course cannot owe permanently—is therefore considered a necessary qualification for holding landed property. Besides, there are annexed to the possession of certain kinds of property, and to particular estates in

England, various rights, which an alien could not properly exercise. The proprietors of manors enjoy some of the royal privileges. The possession of Arundel Castle was adjudged to confer an earldom on its possessor. *Selden, Tit. of Hon. b.* 2, *c.* 9, § 5. The manor of Scrivelsby, in Lincolnshire, is held by grand serjeanty, on the condition that its lord shall perform the office of the king's champion at the coronations. It would be a strange spectacle to see a French subject, or an American citizen —a revolutionary officer, suppose—prancing in complete armour into Westminster Hall, throwing down his gauntlet, and offering to combat any false traitor who should deny the king's title to the crown. No such rights or duties—no political rights or duties whatever—are attached to the mere possession of any lands in America. To own an estate of a certain extent or value, is sometimes required to qualify a citizen for exercising the right of suffrage, or filling an important office. But the estate, by itself, would give no more right or privilege to its possessor, if an alien, than bank stock, or cash of the same value.

I cannot, then, avoid expressing my surprise, that the law, withholding from aliens the right of inheriting lands—a political law, emanating from

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the feudal constitution of the monarchy and realm of England—a law disposing, in many instances, of the fortunes of the citizens, contrary to their express will, or, if they should die intestate, otherwise than they might be reasonably presumed to have desired—a law, branded by public opinion, throughout almost the whole civilized world—that this alien law, at which the common sense and moral feelings of mankind revolt, should have been adopted by most of our sister states, not one of which have to offer in justification, or excuse for the adoption, any one of the reasons, fictions, or pretences by which that law, in England, may be palliated.

Is there any provision in the constitution or laws of the United States which forbids aliens, or from which it may be inferred that aliens ought not, to hold or inherit real property? No such thing, but directly the reverse. The federal constitution requires citizenship as an indispensible qualification for being a member of the house of representatives or the senate, or for holding the office of president: but does not require it in the judges of the supreme court, every one of whom might therefore be an alien. The laws of the United States allow aliens as well as citizens to purchase and hold public lands; and, during the late war, congress be-

stowed a handsome tract of land upon every soldier, native or foreigner, who enlisted in the service of the United States. Can it then be imagined that the constitution or laws of the United States are in the least repugnant to the right of foreigners to *inherit* lands?

If it is held unjust and odious to enforce this alien law of disinherison in Europe, how impolitic must it be considered in the United States —in these free and liberal republics to which foreigners are every day invited by us, in books and newspapers, in speeches and songs and publications of every sort, to repair, as to the inviolable asylum of oppressed humanity. In most of these states, aliens may purchase and hold land, though they cannot inherit such property, nor transmit it to their alien heirs. Shall a pretext then be afforded to the envious and malignant enemies of our institutions, to insinuate that the expectation of escheats is one of the motives of our hospitality—that our political Sirens are alluring foreigners to our shores for the sake of spoil and plunder? We know how utterly false and groundless such an insinuation would be; but that will not prevent malice from making it.

Louisiana, however, stands free from the possibility of any such reproach; and she may ex-

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pect, in consequence, to receive a considera portion of that wealth and industry which now emigrating from Europe. The emigra if they establish themselves here, need not a prehend that their property will, at their dea escheat to the state, or descend to some dista relation, who may happen to be a citizen of the United States. It will be transmitted, accor ing to the will of the owner, or if he make n will, to his nearest kindred, to whatever nation they may belong. The only case in which the state can inherit, is, as the counsel has correctly quoted from the civil code, in defect of *lawful relations*, or of a surviving husband or wife, or acknowledged natural children of the deceased. The code does not say in defect of lawful relations, &c. *being citizens of the United States*, but generally, of any lawful relations whatever. If our code contained nothing on the subject but this single article, we might fairly infer from it that foreigners were not deprived of the natural right of inheriting the property of their relations in this state.

Although far, very far, from being desirous of presenting myself in any other character than as the advocate of the appellant, I yet flatter myself that I have stated this case with as much candour as if I had the honor of being an as-

sessor of the court. I have brought forward, or noticed, every thing which appeared to me deserving of the name of an authority, on either side of this great question; a question which involves, in this one cause, a property worth between fifty and sixty thousand dollars, and which may, and probably will, extend to fortunes of ten times that amount: and on summing up and duly considering the whole, I think *we* may feel proud, that there is one commonwealth in the American union whose civil code is not disgraced by that remnant of feudal jealousy, barbarism and injustice which still lingers in our northern states; and that Louisiana, *prima inter pares*, stands as honorably distinguished in legislation as in arms.

Under these impressions, I confidently expect that the judgment of the inferior court will be reversed; and that the whole estate, real, as well as personal, of the deceased A. Phillips, will be decreed to belong to his brother, the appellant, though a foreigner, in preference to his distant relations, the appellees, who are citizens of the United States.

MARTIN, J. delivered the opinion of the court. The only question for the decision of this court

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is, whether an alien may inherit real estate in Louisiana.

It is first necessary to enquire whether he may hold real estate.

The defendant's counsel contends he may not. He relies on *ff.* 28, 5, 6, *n.* 2, *id.* 59, *n.* 4, to shew that aliens could not at Rome; but this shews that they could not take by will. *Non habet testamenti factionem activam vel passivam.*

2. He next endeavours to shew that the *droit d'aubaine* prevails in Spain. In this, he does not appear to have succeeded: but if he had, it would only shew that an alien may not transfer property by will or succession.

3. The Spanish statutes are next relied on, to shew that the sale, gift or alienation of cities, towns, castles, lands or hereditaments, *heredita-mientos*, to an alien is prohibited.

The plaintiff's counsel contends, that the prohibition is confined to estates, to which some jurisdiction or civil or military power is annexed, and produces in favor of this position a legislative construction of these laws, which he finds in the *Partidas* and the *Nueva Recopilacion* and the *Leyes de las Indias*, *Ordonmiento real* and *Autos Accordados*.

Naturalization may be obtained in Spain by acquiring an inheritance, *por hereditamiento*—

Partida 4, 4, 2—by the acquisition, by purchase or donation, of real property, *bienes raices*. *Nueva Recopilacion*. And foreigners are forbidden to trade to the Indies, unless they have acquired real property, of the value of four thousand ducats, by purchase or inheritance. *Recopilacion de las leyes de las Indias*.

Now, it is impossible to give effect to these laws, by which naturalization may be acquired by an alien, unless the construction of the former laws, contended for by the plaintiff's counsel, be adopted. Is it not illusory, to say that a foreigner may obtain naturalization by acquiring real estate, if he be not permitted to make the acquisition?

If the laws, quoted by the plaintiff's counsel, be attentively examined, the construction contended for will not appear a forced one. "We declare, that we do not intend to give or grant to any king, or other foreign person, out of our kingdom, any city, town, castle, place, land or inheritance, nor any island," &c. *Nueva Recopilacion*. The donation is not valid to any stranger out of the realm, of any city, town or hereditament."

"We forbid that any of our subjects or vassals should give, sell or exchange any city, town, castle, land or hereditament, or island, of

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our kingdom, to any king, lord, or any other stranger, out of our kingdom, under the pain of our displeasure." *Nueva Recopilacion.*

The laws, which are offered as evidence of the legislative construction contended for, are positive. It is further contended that, if they do not shew that the former ones are to be thus construed, these are impliedly repealed.

The legislator, authorising aliens to obtain naturalization, by the acquision of landed property, must necessarily authorize such an acquisition, and effectually repeal the laws which forbade it. *Cum quid conceditur, conceditur id per quod pervenitur ad illud.*

If we are enabled to conclude that aliens can hold real estate in Spain, it remains to be inquired whether they may acquire it by inheritance.

Here it is proper to remark, that none of those prohibitive laws cited, affect, except by a remote construction, the right of acquiring real estate by inheritance.

Any person may be instituted as heir, who is not prohibited from being so. *Partida* 6, 9, 4.

In the fourth law of the same title, persons, who are incapacitated from inheriting, are enumerated, and aliens are not spoken of.

Persons, who may not make a will, are enu-

mented in *Partida* 6, 1, 13—aliens are not among them.

The third law of the same title provides, that *peregrinos*, pilgrims, may make their wills.

It would be idle to suppose, that the circumstance of a Spanish subject, going on a pilgrimage, in his own country, would require a positive law to authorize him to make a will. The inference is strong, that alien pilgrims are referred to.

The succeeding law makes it the duty of the bishop, or his vicar, to take care of the property of strangers and pilgrims, for their heirs; to write to them, that they may come or send for such property; and, if the heir neglects to come or send for it, it shall be employed in pious uses.

The *Recopilacion de las leyes de las Indias* has the following proviso: If he who died left a writing, in form of a testament, which is to be proven by witnesses, as being a stranger or *peregrina*, the cognizance of it belongs to the ordinary judges.

Hence we conclude, that the maxim of the Roman law, which denied to aliens *testamenti factionem, activam vel passivam*, does not prevail in Spain.

But the plaintiff's counsel shows that the

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viceroys of Spanish America and the audiences are directed, "in case persons, with sufficient vouchers, claim the estates of persons who died in the Indies, they may receive them, unless they be strangers; and that the king's subjects may not receive the estates of strangers." *Recopilacion de las leyes de las Indias* 2, 32, 44; and this is presented to us as proof that the principle prevails, at least in Spanish America.

By the 36th law of the same title, "testamentary executors, heirs and other retainers of goods of deceased persons, who, according to the will, are bound to deliver them, in whole or in part, to persons within these our kingdoms, are ordered, at the expiration of one year, to send whatever they may have collected to the *casa de contratacion* of Seville."

Not only aliens, but many of the Spanish subjects themselves, were excluded from the dominions of the king of Spain in America, and the property of those who, contrary to the prohibition, introduced themselves there, was liable to confiscation. On the death of any individual in the American provinces, whose property was not claimed there, it was deemed proper to submit the rights of alien claimants, or of Spanish claimants, not resident on the spot, and even the claims of the colonists, to

the estate of an alien, to a severe scrutiny in Europe. For this purpose, if the claimant resided in Spain, the estate was to be sent to *casa de contratacion* in Seville, where that scrutiny was to take place. But, if the deceased was an alien, then, if an alien claimed the estate, the cognizance of the claim was exclusively confined to the council of the Indies. *Recopilacion de las leyes de las Indias* 9, 37, 24. The colonial authorities, even the viceroys and audiences, were interdicted from interfering in such cases. We see, therefore, nothing in these statutes that affect the present case.

By the 15th article of the instructions of governor Gayoso to the commandants, relating to the grant of lands, provides that, in case of death, he (the grantee) may leave them (the premises) to his lawful heir, if he has any resident in the country; but, if he has no such heir in the country, they shall in no event go to an heir who is not in the country, unless such heir shall resolve to come and live in it. 1 *Laws of the United States*, 543.

This condition, directed to attend the grant of land, is a strong presumption that there did not exist, in the knowledge of the governor, any principle of law which forbade aliens from acquiring land.

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Nothing in the laws of Spain, or of her colonies, appears to us to exclude aliens from the inheritance of real estate.

Our own statute makes no distinction in the nature of property, in order to regulate the succession. *Code Civil*, 146, *art.* 9, 10. Nothing shews that aliens must be excluded from the acquisition of real or personal property, by will or succession, and are not capable to inherit either.

All free persons, even the minor, pupil, lunatic and ideot, may transmit their estate, *ab intestat*, and inherit from others. Slaves alone are incapable of either. *Id.* 158, *art.* 64.

Nothing appears to us to exclude aliens from the inheritance of real property; and we think that the district judge erred in refusing to the plaintiff the real property, left by his brother.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is ordered, that Thomas Phillips do recover the whole estate, real and personal, of Archibald Phillips, deceased, his brother; and, as Thomas Rogers was admitted as heir, the costs to be paid out of the succession.

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9 In a possessory action, the judgment ought not to pronounce on the title. *Justice* vs. *Williams.* 685

10 If a slave be claimed, under a statute, which pronounces his forfeiture, if removed, without the owner's consent, the petition must state that he was so removed. *Hicks & wife* vs. *Calvit.* 691

11 An action for money laid out and expended, or had and received, does not lie against a wrongdoer. *Foster & al.* vs. *Dupre.* 6

PRESCRIPTION.

1 Settlers entitled to a grant, under the act of congress, of March 2, 1805, may prescribe from that day. *King & al.* vs. *Martin.* 197

2 The party pleading, is not doomed to answer an interrogatory, whether he has paid the debt. *Burke* vs. *Flood.* 403

3 Of twenty years, required of a slave claiming his freedom, in the absence of his master. *Metayer* vs. *Noret.* 566

PRIVILEGE.

On real estate, in the hands of a third person, cannot be exercised, without a judgment against the original debtor. *Mouchon* vs. *Delor.* 395

PROMISSORY NOTE.

Is not presumed to be paid, on the lapse of five or six years. *Loze* vs. *Zanico.* 391

REFEREES.

1 After praying their report to be made the judgment of the court, the party cannot attack it for informality. *Bariteau* vs. *Lefevre.* 481

2 If they report a balance due to the defendant, he cannot have judgment therefor. id.

RES JUDICATA.

A judgment is not, as to those who were not parties thereto. *Augustin & al.* vs. *Cailleau & al.* 464

RESPITE.

A creditor who granted a, may sue, if in the mean while the debtor becomes insolvent. *M'Bride* vs. *Crocherons.* 105

RESPONSIBILITY.

If A writes to B, that C, "being unacquainted in New-Orleans, will be indebted to B's politeness for assistance, and his bill on his father will be honored," he is responsible for the payment. *Amory & al.* vs. *Boyd.* 414

SALE.

1 When the vendee, in the contract of sale, lets the premises to the vendor, no delivery of possession is necessary. *Highlander* vs. *Fluke & al.* 442

2 The process verbal of the register of wills is evidence of a sale. *Zanico* vs. *Habine.* 372

3 The rescission of a sale cannot be demanded, on account of a capital crime committed by the slave immediately after the sale. id.

4 The vendor's privilege is postponed to law charges, if the vendee become insolvent. *Delor* vs. *Montegut's syndics.* 468

See CONTRACT, 2, 3, 4—DEED, 1—INDIANS, 1—LAND, 4, 7—PRACTICE, 6.

SLAVE.

1 A master who has agreed to free his, for a certain sum, is not compelled to do so, by the receipt of part, till he receives the whole. *Cuffy* vs. *Castillon.* 494

2 If on an injury to his slave, the plaintiff recovers his full value, the property is transferred to the defendant, on payment of the judgment. *Jourdan* vs. *Patton.* 615

3 No interest can be given on such a price; but the delay sustained by the plaintiff may be considered in fixing the value. id.

See DONATION, 1—EVIDENCE, 6—PRACTICE, 10, 11, 15—PRESCRIPTION, 566—SALE, 3, 4.

SIMULATION.

1 A feigned vendee will be decreed to re-convey, even when the object of the sale was to protect property from threatened suits. *Greffin's ex'rs.* vs. *Lopez.* 145

2 When a counter letter is accounted for, parol evidence of its contents may be admitted. id.

SURETY.

May be sued without the principal. *Curtis* vs. *Martin.* 674

See ATTACHMENT, 2—PRACTICE, 7.

WAGES.

Cannot be claimed by the master of a ship, lost by his neglect. *Latham* vs. *West.* 57

WIFE.

Binding herself with her husband, and renouncing the laws in her favor, cannot demand proof of the debt having been contracted for her benefit. *Chapillon and wife* vs. *St. Maxent's heirs.* 166

PRINCIPAL MATTERS.

WILL.

1 Attended with the formalities required in an olographic one, is valid as such, though it appears that the testatrix intended to make a mystic will. *Broutin* & *al.* vs. *Vassant.* 169

2 A superscription is not of the essence of an olographic will. id.

3 The testator may dispose of part of his estate on an universal, and of the rest on a particular, title. *Gardner & al.* vs. *Harbour* & *al.* 408

4 If a wife has a legacy of the enjoyment of the estate, she takes it on the appraisement made immediately on the husband's death, and pays no interest thereon. *Marshal* vs. *Marshal.* 695